

Amsted Industries and Belton Nails

Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 165, AFL-CIO-CLC and Belton Nails. Cases 10-CA-25259 and 10-CB-5762

December 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On May 1, 1992, Administrative Law Judge Robert A. Gritta issued the attached decision. Respondent Employer and Respondent Union filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to dismiss the complaint, affirming the judge's rulings, findings,² and conclusions³ only to the extent consistent with this Decision and Order.

This case concerns the discharge of Charging Party Belton Nails following two workplace encounters between Nails and Respondent Union President Jimmy Underwood. The judge found that the Respondent Union sought reprisal against Nails because, during the second encounter, Nails threatened to resign from the Union and complained about perceived contract violations. The judge concluded that the Respondent Union's conduct was arbitrary toward Nails and thus inconsistent with its statutory obligations under *Miranda Fuel Co.*, 140 NLRB 181 (1962). He therefore found that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act. He also found that Respondent Employer violated Section 8(a)(1) and (3) because it discharged Nails pursuant to Respondent Union's communication, through Underwood, of its

displeasure with Nails. For the reasons below, we reverse.

Facts

Respondent Union represents a unit of Respondent Employer's production and maintenance employees. On November 15, 1990, Respondent Employer hired Nails as a "grinder." By mid-December 1990, Nails was about to complete his 30-day probationary period under the terms of the parties' collective-bargaining agreement. Sometime in mid-December, Underwood, who is also employed by Respondent Employer, approached Nails in Respondent Employer's breakroom for the purpose of soliciting Nails to become a union member. Underwood informed Nails that everyone in the bargaining unit was a union member. Underwood stated that "we try to avoid working scabs at the plant" and told Nails that if he was not a union member he would be a scab. According to Underwood's credited testimony and the credited testimony of employee witnesses Richard Lee Price and Joseph Smith, Nails began to "rant and rave," used profane and obscene language to Underwood, and threatened to "start whipping ass around here."⁴ Following the encounter, Smith urged Underwood to inform management of Nail's conduct, but Underwood declined to do so. Shortly thereafter, Nails joined the Respondent Union.

In March 1991,⁵ a second incident occurred shortly after a series of events that culminated in Nails' transfer from his grinder position on the second shift to a "drag cleaner" position on the third shift. Thus, on March 18, Nails was bumped from his grinder position following the return of a more senior employee from an injury leave of absence. When Nails elected to transfer to the third shift by bumping a junior employee, Assistant Plant Manager Robert Ferguson told Nails that he could work his regular grinder shift through 10 p.m. and then begin his new drag cleaner job on the third shift at 11 p.m. that same day. Thereafter, Ferguson realized that the drag cleaner employee that Nails displaced was contractually entitled to sufficient notice of the bumping and was entitled to work his shift that day. As a result, Nails was sent home and did not commence his new drag cleaner job until the following night.

On March 19, Nails called Respondent Employer's personnel office and complained that he had lost a shift and was entitled to 8 hours' pay. When personnel explained to Nails that the combination of the required notice provisions and the circumstances of the bumping inevitably results in a "lost shift," Nails asked Respondent Union Plant Committeeman Harry Little to look into the matter. Thereafter, Little attempted to ex-

¹ The Respondents jointly have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² Respondent Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In adopting the judge's conclusion that deferral to the parties' grievance-arbitration procedure is inappropriate, we rely on the fact that Respondent Union's interests are adverse to those of Charging Party Nails with respect to the issue in the arbitration proceeding, given their conflicting positions in this proceeding. *Regional Import Trucking Co.*, 292 NLRB 206, 231 (1988). Accordingly, we deny the Respondents' joint motion to supplement record with an arbitration award pertaining to Nails' discharge.

⁴ The judge discredited Nails' denial of the "whip ass" threat to Underwood.

⁵ All subsequent dates are in 1991.

plain to Nails that Respondent Employer had correctly applied the notice provisions and that Nails' March 19 starting date was proper. When Nails refused to accept Little's explanations, Little suggested that Nails speak to Underwood about the matter.⁶

At 11 p.m. on March 19, Nails started his new position on the third shift. When Nails finished his shift at 7 a.m. on the morning of March 20, he was still upset and angry about the loss of 8 hours' pay. After proceeding to the Employer's bathhouse to clean up after the shift, Nails encountered Little and, shortly thereafter, Underwood. While in the bathhouse area, Nails and Underwood discussed Nails' loss of 8 hours' pay. As the judge found, Nails was "angry, belligerent and cursing Underwood." Employee Michael Jones, who witnessed the encounter, credibly testified that Nails "had Jimmy Underwood up against the wall shaking his finger in his face and cussin' him out." Little credibly testified that Nails told Underwood that he would resign from the Union. In response, Little told Nails that he could not resign, but Little was corrected by Underwood, who assured Nails that he could get out of the Union if he so desired. Little credibly testified that Nails responded to Underwood as follows:

If I want to get out of the Union, I'll get out of the Union and, if not, I've got a .38 and I'll get my .38 and I'll blow anybody's goddamn brains out who tries to stop me from coming through the gate.

Underwood told Nails that he did not have to listen to such language and walked out of the bathhouse. After Underwood and Little left, Underwood told Little that "Nails needed to be taught a lesson and shown that we won't tolerate that language."

Following the encounter, Underwood returned to his work station without reporting the incident to management. That afternoon, however, Second-Shift Foreman Eugene Kennedy Jr., a longtime friend, approached Underwood. Kennedy asked Underwood how he was doing. Kennedy credibly testified that Underwood then told him that Nails had threatened Underwood's life that morning, that it was the second time that Nails had done so, and that he wanted something done about it. Thereafter, Kennedy passed on Underwood's description of the encounter to Assistant Plant Manager Robert Ferguson who, after initially deciding only to issue Nails a warning slip, elected instead to discharge Nails. Ferguson did not interview Nails or any other witnesses to the encounter between Underwood and Nails. After Nails finished his shift on the morning of

March 21, Respondent Employer informed Nails of his termination.

Discussion

The judge found that Underwood was motivated to action by Nails' threat to resign from Respondent Union. The judge rejected the contention that Nails' conduct placed Underwood in fear of physical harm and found that Underwood's notification to Foreman Kennedy that he had been physically threatened was not the real reason that he complained about Nails.

At the outset, we note that the judge discredited all the pertinent portions of Nails' testimony regarding his conduct during the December 1990 and March 1991 encounters with Underwood. Indeed, the judge found that "Nails is a foul mouthed individual . . . who intimidates people any way he can and . . . that Nails attempted to intimidate Underwood on March 20 with his foul language, physical presence and intractable position on the loss of the 8 hours."⁷ After making these crucial credibility resolutions, however, the judge drew additional inferences critical to his conclusion that Underwood was not motivated by Nails' threats of bodily harm when he informed Foreman Kennedy of the March 20 encounter. We reject these inferences, as explained below.

The judge found that, notwithstanding Nails' threats of bodily harm to Underwood, Nails' "primary" threat on March 20 was to withdraw from Respondent Union. The judge found that Nails' threat to use his .38 caliber pistol was a "secondary" threat. Further, the judge found that Nails did not threaten Underwood personally with blowing his brains out or blowing his head off with the .38 pistol. It appears that the judge found it significant that Nails' threat to use his .38 referred to "anybody's" brains rather than specifically to *Underwood's* brains. Thus, with regard to Underwood's testimony the judge found:

his testimony of Nails' threat does not unequivocally show a specific threat to Underwood. I don't doubt that Underwood heard Nails say something about a .38 but I do not credit Underwood's testimony that Nails threatened to blow *his* brains out or *his* head off. [Emphasis in original.]

Based on what he perceived to be a critical distinction between Nails' reference to "anybody's" brains as opposed to "Underwood's" brains, the judge found that Underwood "embellished" the incident when he told Foreman Kennedy on March 20 that Nails had

⁶There is no dispute that the explanations to Nails regarding the bumping are in accord with the parties' collective-bargaining agreement.

⁷Nails testified that during the March encounter he did not use foul language to Underwood, that he was not in Underwood's face, and that he never said anything about a .38 caliber pistol or blowing anybody's brains out.

“threatened my life.”⁸ In short, based largely on this distinction, the judge inferred that Underwood was not truly intimidated by Nails’ threats of bodily harm when he complained to management about them and that, instead, the real reason for his complaint was Nails’ threat to resign from the Union.

Contrary to the judge, we believe that there is no meaningful distinction between Underwood’s description of the March 20 threat and the version of the events that the judge credited elsewhere.⁹ As the judge found, Nails attempted physically and verbally to intimidate Underwood on March 20. Nails cursed Underwood, was “in his face,” and backed Underwood against a wall. And it was in this context that Nails threatened to “blow anybody’s goddamn brains out.” Thus, Underwood’s representation to Foreman Kennedy that Nails had threatened to kill him is a reasonable description of what occurred. The plain meaning of Nails’ remarks, and his accompanying menacing conduct toward Underwood, provided more than enough reason for Underwood to view the encounter as posing a serious threat to his life and limb. Accordingly, we find no basis to infer, as did the judge, that Underwood “embellished” the events of that day when reporting the incident to management.¹⁰ It follows, therefore, that no inference is warranted, on this basis, that Underwood’s report was undertaken for the ulterior purpose of punishing Nails for threatening to resign his union membership.¹¹

The judge’s additional grounds in support of his inference that Underwood reported the incident for the purpose of retaliating against Nails for threatening to resign also do not withstand scrutiny. From Underwood’s comment to Little, on leaving the bathhouse, that “Nails needed to be taught a lesson,” the judge inferred that the “lesson” Underwood wanted to teach Nails was the power of the Union. In drawing

this inference, however, the judge failed to note the portion of Underwood’s comment to Little that came after the word “lesson,” to wit: “and show that we won’t tolerate that language.” Thus, the “lesson” that Underwood described, when his comment to Little is viewed in its entirety, concerned Nails’ use of offensive, threatening, and profane language, and not Nails’ threat to resign. Further, there is nothing in Little’s testimony that indicates that on March 20 Underwood was concerned about Nails’ threat to resign from the Union. To the contrary, the credited evidence is that Underwood specifically *assured* Nails during the March 20 encounter that he had the right to resign if he so desired.¹²

Similarly without merit is the judge’s inference that Underwood was not intimidated by Nails’ conduct because he failed to report the encounter immediately to management. Underwood’s delay in reporting the incident is subject to any number of possible inferences other than the inference that the judge drew. For example, one could infer that Underwood waited until his friend Kennedy arrived because he wanted to seek Kennedy’s counsel as to what he should do, or that Underwood simply needed time to consider the appropriate course of action he should undertake, or that Underwood was so intimidated that initially he feared that reporting the encounter might further agitate an individual whom the judge himself described as one “who intimidates people any way he can” and could lead to even more serious retribution. Accordingly, we find that the reporting delay is essentially a neutral element that provides no support to the judge’s inference that Underwood acted for the purpose of retaliating against Nails because he threatened to resign from Respondent Union.

In sum, we find that employee Nails made a serious threat of bodily harm to Underwood, that Underwood had a reasonable basis to report the threat to management and to request that something be done, that there is no basis in the record to infer that Underwood’s report was motivated by Nails’ threat to resign from Respondent Union or by his complaint about the loss of 8 hours’ pay, and that Respondent Employer discharged Nails pursuant to Underwood’s report solely because it was concerned about Nails’ threat of serious bodily harm.¹³

⁸ Although he initially described Underwood’s description to Kennedy as an embellishment of the events, the judge went on to state later in his decision that Underwood’s report “was untrue.”

⁹ We do not disturb the judge’s credibility resolutions and, indeed, we specifically rely on his credibility resolutions regarding the March 20 encounter. We take issue only with the inferences that the judge drew pursuant to his credibility resolutions.

¹⁰ We recognize that Underwood told management that the March 20 incident was the second time that Nails had threatened his life. Concededly, the first threat was only a threat of a physical beating. However, in light of the passage of time between the two threats and given the fact that a physical beating can be life-endangering, we do not believe that Underwood was deliberately distorting the facts.

¹¹ Apart from the distinction he drew between Underwood’s brains and “anybody’s” brains, it also appears that the judge’s inference as to Underwood’s motive is drawn from the judge’s distinction between Nails’ threat to withdraw from Respondent Union as the “primary” threat and Nails’ threat to use his .38 pistol as the “secondary” threat. Again, as with the “brains” distinction, we find that the judge’s “primary-secondary” distinction serves no useful purpose as Underwood might well be intimidated by even a “secondary” threat to blow his brains out.

¹² Underwood’s assurances on March 20 also tend to temper any adverse implications raised by Underwood’s reference to “scabs” the previous December. Although we recognize that the reference to scabs was pejorative, we note that Underwood was soliciting Nails to become a union member at the end of Nails’ probationary period when he made the remark in December and was contrasting Nails’ then nonunion status with the union status of other members of the bargaining unit.

¹³ Because we find that Underwood’s report of Nails’ threat of bodily harm was not pretextual and that the evidence fails to show that any exercise of protected concerted activity motivated Nails’ discharge, we find it unnecessary to consider any alternative conten-

Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

tions raised by the Respondents to support dismissal of the complaint.

The General Counsel contended before the judge that Nails was disciplined for conduct that was part of the *res gestae* of Nails' protected concerted activities during the encounter. The judge made no finding specific to this contention and the General Counsel filed no exceptions. Nevertheless, even assuming that the *res gestae* principle would be applicable to the facts of this case, we find that the egregious conduct of Nails would warrant denial of any protection under the Act that Nails may have enjoyed during the encounter. *Paper Board Cores*, 292 NLRB 995 fn. 3 (1989).

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on August 6 and 7, 1991, in Birmingham, Alabama, based upon charges filed by Belton Nails (the Charging Party) on April 1 and 10, 1991, and a consolidated complaint issued by the Regional Director Region 10 of the National Labor Relations Board on May 14, 1991.¹ The complaints alleged that the Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local 165, AFL-CIO, CLC (Respondent Union) violated Section 8(b)(1)(A) and (2) of the Act by attempting to cause the Employer to discipline Belton Nails and by causing the Employer to discharge Belton Nails for arbitrary and invidious reasons. Amsted Industries, Inc. (Respondent Employer) violated Section 8(a)(3) and (1) of the Act by discharging Belton Nails because he engaged in protected concerted activity. Respondent Employer's timely answer denied the commission of any unfair labor practices. Respondent Union's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel, Respondent Employer, and Respondent Union. All briefs were duly considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The consolidated complaint alleges, Respondent Employer admits, and I find that Amsted Industries, Inc. is a Delaware corporation engaged in the manufacture of steel railroad car wheels in Bessemer, Alabama. Jurisdiction is not in issue. Amsted Industries, Inc., in the past 12 months, in the course

and conduct of its business operations shipped products from its Bessemer, Alabama facility valued in excess of \$50,000 directly to points located outside the State of Alabama.

I conclude and find that Amsted Industries, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The consolidated complaint alleges, Respondents admit, and I conclude and find that Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

1. Whether the Employer discharged employee Belton Nails because he engaged in protected concerted activity in violation of Section 8(a)(1) and (3) of the Act.

2. Whether the Union attempted to cause the Employer to discipline Belton Nails and did cause the Employer to discharge him for arbitrary and invidious reasons in violation of Section 8(b)(1)(A) and (2) of the Act.

III. OVERVIEW

Amsted Industries, Inc. is the current owner of the wheel plant. The employee bargaining unit of several hundred employees has been represented by the Union for over two decades. The immediate supervision and the employee union officials involved in the events of this case are longtime employees (several with 27 years' tenure) in contrast to the alleged discriminatee (the Charging Party) who at the beginning of the events was the only 30-day probationary employee in the plant.

The collective-bargaining agreement and the plant work rules are of longstanding and other than as the procedural basis for conduct of the parties are not subject to any determination.

Notwithstanding, the Respondent Employer's and the Respondent Union's pretrial willingness to grieve the discharge of Belton Nails and to take the discharge to arbitration, the General Counsel of the Board refused to defer the case to the arbitration, electing instead to seek an unfair labor practice.

In spite of renewed arguments at trial for deferral the General Counsel's position remains unchanged and I find nothing in the arguments of Respondents substantial enough to support an order of deferral on my part.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The complained of conduct herein grew out of two separate confrontations between Union President Underwood and employee Belton Nails. The first encounter occurred in mid-December 1990 on the very day that Nails' probationary period as a new employee was to end. Nails shift was 2 to 10 p.m. During a breaktime Nails went to the breakroom. Underwood told Nails that it was about time for him to join the Union and admittedly told Nails if he did not join the Union he would be a scab. Underwood stated that all unit employees are members of the Union and we do not work scabs in the plant. A disputed conversation then ensued which resulted in Underwood and Nails continuing their conversation in the bathhouse. Nails states he told Underwood to talk better to him and they should talk by themselves. Three witnesses Underwood, Price, and Smith state that

¹ All dates herein are in 1991 unless otherwise specified.

Nails was cursing Underwood with language including "fucking, mother-fucking, shit, and goddamn." Although Nails would not agree to the use of specific language, he did admit to cursing Underwood. Nails also denied making any specific threats against Underwood such as "whip your ass" but other witnesses to the conversation state that Nails did indeed threaten to whip Underwood's "ass." Nails and Underwood then agreed to continue the conversation in the bathhouse. Once in the bathhouse Underwood chided Nails for the foul language stating that he was a pastor and did not appreciate Nails using it with him. Nails told Underwood that he was not against unions but the last union he was associated with messed him around and he did not want it to happen again. The two parted. Smith had followed the two from the breakroom to the bathhouse but because the conversation was toned down he could not hear what was said. After Nails had left, Smith told Underwood, "this is too much, we do not need this around here. Nails does not have his probation in, let us nip this thing in the bud." Underwood told Smith to let it go. Smith asked, "Are you sure that's what you want to do?" Underwood replied, "Yes, just let it go." Nails did after the end of his shift sign a union card and become a member. Neither Underwood nor Smith reported the incidents of the abusive language or the threat by Nails to anyone in supervision.

Although Nails denied telling Underwood he would "whip ass" and refrained from the use of any foul language in his testimony when asked to recall what he had said, including profanity, he did on cross admit that he cursed Underwood during the conversation. Nails in later testimony also admitted that Underwood stated he was not going to stand for Nails cursing him during conversations. The continuity of the conversation and the plausibility of the event is best recounted in the testimony of Underwood, Smith, Price, and the several admissions by Nails of conclusionary substance. I found Price and Smith to be most trustworthy in their testimony and Underwood, although unsure of some of his testimony, was making a genuine effort to recall the events as they happened. I credit the testimony of Price, Smith, and Underwood with regard to the substance of the conversation between Nails and Underwood. I discredit Nails denial of the "whip ass" threat to Underwood and find that Nails used the foul language, "F—, M— F—, shit, and goddamn" to Underwood during the conversation.

Following Nails' membership in the Union no incident occurred until March 1991. On March 18 an employee senior to both Nails and his shift partner, Lightsey, returned from an injury leave of absence and bumped Lightsey from his job. Lightsey in turn bumped Nails. Assistant Plant Manager Ferguson met Nails in the bathhouse before the 2 p.m. shift started and informed Nails of the bump. Ferguson told Nails he had two options. Either another grinder position or a drag cleaner position on the third shift, 11 p.m. to 7 a.m. As the two were talking Price came into the bathhouse and was privy to the remaining conversation. Nails told Ferguson he wanted to try something new so he would take the drag cleaner position on the 11 p.m. to 7 a.m. shift. Ferguson then told Nails he would work his regular grinder shift through 10 p.m. then begin the drag cleaner shift at 11 p.m. Prince interrupted and told Ferguson that Nails could not work the 11 p.m. shift that night because the man displaced would not be notified until he showed for work and that is not suffi-

cient notice. The man would be notified tonight and get bumped after finishing his shift. Ferguson realized he had made a mistake and informed Nails that if he chooses the drag cleaner position on the 11 p.m. to 7 a.m. shift, he would lose a shift that week. Price left the bathhouse and did not hear Nails' response to Ferguson. The 11 p.m. to 7 a.m., third shift, because of the single hour on the starting date is actually dated for the workweek schedule as the following day when the shift ends at 7 a.m. The third shift is thusly 1 day ahead of the first and second shifts. Nails nonetheless told Ferguson he wanted the drag cleaner position on the third shift and did not complain about the lost shift. Nails did not recall Ferguson telling him when to start the drag cleaning position. He recalls that Ferguson was unsure and said he would check it out and get back to him but Ferguson never did. Nails states that after his second shift ended he saw Foreman Kennedy in the bathhouse and asked him when he should start the third shift. Kennedy told Nails he would go to the office and check the schedule. He told Nails if he does not come back to go on home, if he does come back down to the bathhouse Nails will have to start the third shift at 11 a.m. Kennedy did not come back to the bathhouse so Nails showered and went home. Foreman Kennedy testified and denied having any conversation with Nails about when he should begin working the third shift the same day he was bumped off the second-shift grinding job.

The following day Nails called Piazza, in personnel, complaining that he lost a shift and the Company owes him 8 hours' pay. Both Nails and Piazza agree on what followed Nails complaint. Piazza told Nails that the employee he bumped on the third shift has to come in and work his shift to get notice. The bumped employee then either gets laid off at the end of his shift or he bumps another employee junior to him. Since the employee Nails bumped did not have sufficient seniority to bump anyone he was to be laid off at the end of his shift. Piazza told Nails that since the third shift starting at 11 p.m. on Sunday night is the first shift of the workweek any bumping during the week results in a lost shift. Nails did not contest the explanation and said, "Okay." Nails did, however, talk to Little, a plant committeeman, about the situation and was told by Little that he would check on it.

It is clear that Price's explanation to Ferguson and Piazza's explanation to Nails regarding the bumping of employees off their shift is in accord with the collective-bargaining agreement. It is equally as clear that Nails had little or no intention of accepting the various explanations. I found the testimony of Price and Ferguson to be straightforward and most plausible with respect to the procedures followed when employees are placed in bumping circumstances. Nails' recall of the conversation respecting whether he was to start the third shift that first night I find incredulous. Not one, but two experienced supervisors would say, in response to Nails query whether to start a new shift that night, "I will get back to you or if I do not come back to you, go on home, but if I do come back to you then you will start work within the hour." I cannot credit Nails' version of the conversation particularly since the plant has a paging system available to all employees with entire plant coverage. If Nails was in fact concerned about work that first night of the 11 p.m. shift a phone call would have defined everything. Nails testimony was too vague and his responses were too guarded to be be-

lieved. I credit the disinterested witnesses Price and Ferguson and conclude that Ferguson did tell Nails if he chose the third-shift position of drag cleaner he would lose a shift because he could not begin the third shift until the following night. I conclude and find that to be the reason Nails showered and went home after completing his last 2 to 10 p.m. shift.

Nails started his new 11 p.m. to 7 a.m. shift Tuesday, March 19. Wednesday morning, March 20, at 7 a.m. his shift ended and he went to the bathhouse. Once in the bathhouse he continued his anger over the loss of the 8-hour shift. Little had been unable to satisfactorily explain the loss to Nails and had suggested a talk with Underwood. Both Nails and Little were in the bathhouse to clean up after shifts and go home. After Nails and Little showered, Underwood came into the bathhouse. Thomas and Jones were also in the bathhouse. It is undisputed that Nails and Underwood discussed the loss of 8 hours' pay by Nails and Nails was angry, belligerent, and cursing Underwood. Nails testified to the use of "damn" only but the other four witnesses stated that Nails frequently used "M— F—" to Underwood and with regard to the Union. Nails admittedly told Underwood that he would get out of the Union if he did not get his 8 hours' pay. Jones testified that Nails had his finger in Underwood's face and was backing him towards the wall during the discussion. Thomas recalled that Nails told Underwood, he was getting out of the "M— F— Union" and there was not "a M— F— thing Underwood could do about it." In addition to Nails' denial of using foul language to Underwood, he denies that he was in Underwood's face during the discussion and denies saying anything about a .38 caliber pistol or blowing anybody's brains out. Underwood stated that Nails said, "I've got a .38 in my truck and I'll blow some M— F— brains out." Underwood also stated that the bathhouse sequence was the second time Nails mentioned having a .38 and using it; however, later he changed his testimony saying some employees told him after the December exchange in the breakroom that Nails often bragged about having a gun in his car. Little recalled that after Nails said he would get out of the Union, Nails said, "I've got a .38 and I'll get my .38 and I'll blow anybody's god-damn brains out who tries to stop me from coming through gates." Neither Jones nor Thomas heard Nails threaten Underwood with the use of a .38 but Jones did recall that before Underwood arrived in the bathhouse Nails, talking to himself but loud enough for Jones to hear, said he had a .38 derringer that would fit in his coat pocket. Jones did not actually see a gun belonging to Nails. All witnesses agree that Underwood told Nails that he did not have to listen to such language and walked out the bathhouse door and Nails kicked the door as it was closing. Little testified without contradiction that after he and Underwood left the bathhouse Underwood told Little, "Nails needed to be taught a lesson and shown that we won't tolerate that language." Neither Underwood nor Little reported the incident to supervision. As Underwood later testified he did not report the incident because he did not want to cause the man any problems but he did instruct steward Kennedy to inform Nails that night that he would receive a warning. There was a factual dispute among witnesses about whether Underwood upon leaving the bathhouse used the paging system to call for Piazza or Ferguson, whether Nails owned a truck, or car, or a gun and whether Nails had been in jail in the past. In

my view none of the three disputes were material to the issues nor would a resolution of one or more be probative.

Underwood's testimony of Nails .38 was contradictory and he appeared to vacillate between what he could recall of the critical conversation and what he imagined based upon unrelated conversations with other employees at different times. Moreover his testimony of Nails' threat does not unequivocally show a specific threat to Underwood. I do not doubt that Underwood heard Nails say something about a .38 but I do not credit Underwood's testimony that Nails threatened to blow *his* brains out or *his* head off. Underwood's affidavit does not completely support his testimony of Nails' threat of the .38 or the supplemental mention of the .38 derringer following the December exchange in the breakroom. It is significant to me that several critical conversations are not related in Underwood's affidavit. Little's testimony of the events was forthright and direct, even as to certain matters not favorable to the defense of both Respondents. Little's version of Nails' statements relative to the .38 and its use by Nails is more plausible when considered in the context of the conversation. Nails states he would get out of the Union. Little told Nails he could not get out of the Union and Underwood corrected Little stating that Nails could get out of the Union if he wanted to. Nails then with bravado, in effect, said, "I would like to see someone try to stop me." Both Thomas and Jones testified that Nails did not threaten Underwood in any way. Although such a generalized response in this instance may be less helpful than a more specific response the understanding of both witnesses can be explained by Little's recall of the incident. Nails did not direct the .38 statement to Underwood but rather to unknown persons who might attempt to keep him from coming into work after he dropped out of the Union. On balance I do not believe there is any substantial inconsistencies among all the witnesses with the exception of Nails' version of the encounter. I regard Little's account as being more complete and placing a superficially threat in a context permitting a more fair evaluation. The General Counsel offered no rebuttal of Little's testimony with regard to Nails' reference to a .38 and I find Little's testimony entirely credible. I was impressed with Jones' demeanor while testifying and find his recollection of specific foul language used by Nails is worthy of credence. Thomas likewise testified to a recollection of specific foul language used by Nails without equivocation and I find that portion of his testimony credible. However, I do not credit his testimony that Underwood admitted on Thursday, March 21, during work, he made up the threat by Nails on March 20 or that on March 20 following the verbal exchange in the bathhouse Underwood told Thomas he ought to go to the office and get Nails' job. In addition to the unreasonableness of such revelations, neither plausibly fits the credited context of the events. Underwood was not working on March 21 which Thomas insisted on more than one occasion was absolutely the day Underwood confessed. The statement of March 20 attributed to Underwood is incongruous with admitted statements against his own interest made by Underwood in his testimony and is contrary to the testimony of Little which I credit with regard to Underwood's intent on how to handle the Nails incident and the credited testimony of supervisory witnesses as to what Underwood in fact did about Nails and the bathhouse incident. Moreover, as critical as the statements were Thomas failed to include either in his affidavit

given to the Board less than a month after the events occurred. Underwood denied making such statements to Thomas and the objective evidence in the record supports Underwood's denial, which I credit. Lastly, I regard Nails as an untrustworthy witness, incapable or unwilling to relate the facts and with an inclination to offer an account of events from the posture of his own self-interest. It is abundantly clear to me from all the testimony that Nails is a foul-mouthed individual with little or no regard for the feelings of others and who intimidates people any way he can. The credited testimony in this record leads me to the inescapable conclusion that Nails attempted to intimidate Underwood on March 20 with his foul language, physical presence, and intractable position on the loss of the 8 hours. He was attempting, in his own way, to get something for nothing through the Union. His primary threat was to withdraw from the Union if he did not get compensated for the lost shift. His secondary threat was to use his .38 to get through the gate to work as a nonmember of the Union. While I credit Nails' testimony of portions of conversations between he and Underwood which are undenied, I discredit all other portions of conversations between he and Underwood except where corroborated by Underwood, Little, or other credited witnesses.

Further I conclude, based upon the credited testimony, that Nails did not personally threaten Underwood with blowing his brains out or his head off with a .38 pistol. In support of this conclusion I found it instructive that Underwood following the March 20 incident with Nails was preoccupied with Nails use of bad language, rather than substance, and not wanting to cause Nails any trouble by immediately reporting the incident. In addition the December threat of physical violence, "whip some ass," uttered by Nails was overlooked and not reported due to Underwood's priority relating to profane and foul language. The record evidence shows that use of profanity in the plant was commonplace and one wonders if threats of physical violence such as, "whip some ass," are just as commonplace. That is not to say that Underwood was not intimidated by the profuse use of the foulest of language by Nails in any conversation and particularly when the Union or the collective-bargaining agreement was involved as a subject.

Following the incident with Nails in the bathhouse Underwood returned to his workstation. Underwood states that sometime after noon Department Head Holder asked Underwood what was wrong. Underwood told Holder he was okay, nothing wrong. About 2:30 p.m. Gene Kennedy, foreman on second shift and longtime friend asked Underwood, "What happened, you're looking kind of serious?" Underwood told Kennedy that he had a problem with Nails today and proceeded to tell Kennedy of the confrontation in the bathhouse that morning. Kennedy asked Underwood if he had mentioned this to anyone else and Underwood said, "No." Kennedy asked if he had told Piazza and Underwood said, "No." When Kennedy asked why he had not, Underwood said he did not want to cause the man any problems. Kennedy testified that Underwood told him that Nails threatened his life that morning, that is the second time Nails had done it and he wants something done about it. Underwood did not suggest what the Company should do. Kennedy asked Underwood about the first time and Underwood said when he had approached Nails about joining the Union when his probation

period was ended, Nails flew off the handle, cursed him and threatened his life. Underwood states that Kennedy said something should be done and left. Kennedy says he told Underwood he would talk to Holder. Kennedy had no reason to disbelieve what his longtime friend Underwood told him.

Later Holder asked Underwood why he did not say anything that morning. Holder told Underwood he would have done something if he had known. Underwood told Holder he did not want to cause the man any problems.

Kennedy and Holder talked about the two incidents. Holder told Kennedy he had heard about the first incident although no one had come to him direct. The two agreed something had to be done because such conduct could not continue. They decided a warning to Nails would cure the problem. As Holder was telling Kennedy that he would talk to Ferguson, Ferguson walked up to the two men. Kennedy and Holder repeated Underwood's story to Ferguson and he told them he would take care of it. Ferguson testified that Holder told him Nails has threatened to kill Underwood. Ferguson asked, "When?," and Kennedy said when Nails got off shift this morning. Kennedy said Underwood had told him, "It was not the first time and something needs to be done about this." Ferguson asked about the first time and Kennedy said Underwood told him it was when Underwood asked Nails to sign a union card. Ferguson left for the office to call Mike White, director of employee relations in the Chicago office. Before he could place the call he saw Underwood. Underwood states when Ferguson asked about the incident he told Ferguson, "If anything comes of it, pull him aside in the morning, talk with him, and give him a warning slip." Ferguson replied that he would do so. Ferguson recalls that Underwood only asked, "What are you going to do about it," and he told Underwood he would talk to Nails in the morning. Ferguson asked Underwood what Nails' problem was and Underwood responded, "I think he has a mental problem." Ferguson then called White and relayed all the information to him. White agreed a warning would be justified. Later that day Underwood told John Kennedy, the union steward, to tell Nails he would get a warning in the morning. Kennedy did tell Nails that evening that he would get a warning in the morning and to just play it cool.

Ferguson, as he showered after shift, thought about the events of the day and decided he did not need employees like Nails in the plant. Ferguson stated that it does not make a good workplace when employees have threats hanging over them but he could not explain what caused him to change the discipline from warning to discharge. Ferguson did not interview Nails or any other employee witnesses to either of the incidents involving Nails.

Nails testified that as he started working Wednesday night, March 20, at 11 p.m. he saw steward Kennedy. Kennedy told him he could expect a warning but do not worry just stay cool. When Nails finished his shift Thursday morning his timecard was missing from the rack. He went to Piazza's office and Piazza took him to Ferguson's office. Ferguson told Nails he was not going to have employees on the job threatening other people. Ferguson said Underwood told him Nails had threatened to blow his goddamn brains out and handed Nails his termination notice. Nails began to explain and Piazza ushered him out of the office. Piazza stated to Nails, "It's out of our hands now, let the Union handle it." Fer-

guson stated that when Nails came into his office he told him he was being terminated for threat of bodily harm to an employee which is a violation of rule 20. Ferguson said he would not put up with anything like that from anybody. Nails said he did not threaten anybody and Ferguson said, "That's my decision," and handed Nails his copy of the discharge notice. Nails then left.

The thrust of Underwood's testimony is that he did not want to cause Nails any problems after reporting his confrontation with Nails to Kennedy and Ferguson. Underwood stated his only suggestion to supervision was to talk to the man and give him a warning. Kennedy's recall was that Underwood said Nails had threatened his life when he tried to sign Nails into the Union and when the two had a discussion over Nails' loss of 8 hours work. Underwood told Kennedy, "I want something done about it." Ferguson recalled that Holder began his report of the incident by stating, "Nails threatened to kill Underwood." Ferguson then received Kennedy's report which was exactly what Kennedy testified he had been told by Underwood. Ferguson's only contact with Underwood resulted in Underwood asking, "What you gonna do about it?" With the exception of the characterizations of the incidents by Underwood on direct and Kennedy's as reported to him by Underwood there is little dispute of how Underwood perceived the incidents. It is clear his perception at first was one associated only with Nails' use of profane and foul language. Whereas when recounting the incidents to supervision his perception was one associated with a threat to his life. The record testimony disclosed the same vacillation with regard to what he expected supervision to do to correct the situation. His testimony of his actions in response to the incidents was most passive. However, the testimony of the supervisors about his expectations was most active. I am convinced that Underwood was intent to down play his involvement as president of the Union and any influence that may have on the conduct of the Respondent Employer in disciplining Nails. Underwood's testimony when compared with that of other witnesses, both interested and disinterested, fails as a genuine recollection of the critical facts. With regard to the substance of Underwood's report of the incidents to supervision I credit the testimony of foreman Kennedy as straightforward and direct even as to certain matters unfavorable to his longtime friend, Underwood. With respect to Underwood's real interest in discipline for Nails I credit the combined testimony of Foreman Kennedy and Assistant Plant Manager Ferguson. Both supervisors were forthright in their recounting of the events without regard for the probable outcome of their testimony. Although I do not discredit all of Underwood's testimony, where his testimony differs from that of Foreman Kennedy and Ferguson I find his unreliable and do discredit those portions.

Based upon the credited testimony above I conclude and find that Underwood exaggerated the substance of his discussions with Nails in the December 1990 and March 20 encounters when relating the events to supervision. I also conclude and find that Underwood did take an active part in suggesting that Nails be disciplined for his conduct toward Underwood in the two critical incidents.

Analysis

It is clear from the record evidence that although Nails threatened to "whip Underwood's ass" in the December 1990 incident that Underwood was more concerned with Nails joining the Union so no scabs would be working in the plant.

It is equally as clear that the March 20 incident in the bathhouse culminated in Nails threatening to get out of the Union if his lost 8 hours were not compensated. Although Nails was a recalcitrant union member, who did not want to join the Union in the first place, he has the right to resign his membership free of any reprisals from the Union. But Underwood did, immediately upon leaving Nails in the bathhouse, want to teach Nails a lesson by showing him the power of the Union. Whether Underwood was intimidated by Nails or not is thoroughly negated by Underwood's failure to immediately report the "life threatening" incident. Rather Underwood waited until his longtime friend, Foreman Kennedy, came on shift to receive the report. The fact that Underwood's report to Kennedy was in response to a query does not diminish the thrust of Underwood's actions. I find it instructive that Underwood embellished both the breakroom and bathhouse incidents "threatened my life" when responding to Foreman Kennedy. Obviously the embellishment was to ensure a focus by supervision upon Nails' conduct and to support necessary discipline to keep Nails in line. I am convinced that Underwood was motivated to action by Nails' threat to get out of the Union and not by any fear of physical harm. Underwood knew that any discipline of Nails would be effective as a deterrent to other employees because the bathhouse incident admittedly was known throughout the plant. Contrary to Respondent Union's argument I do not find that Underwood was acting as an individual employee (without clout) when reporting the embellished threat. Underwood was conversing with Nails in the bathhouse in his capacity as president of the Union when Nails stated he would get out of the Union. His expressed intent to teach Nails a lesson was uttered as the union president to a union committeeman and Underwood's implementation of that lesson carried the weight and authority of his union office, "I want something done about it." To find that Underwood merely reported a threat and it was beyond his power to influence the Employer would be to overlook the realities of this workplace and the friendships of several represented decades extant in the plant. In my view the contention that Underwood only sought a warning and therefore is somehow not responsible for the resulting discharge is unavailing. Underwood set the discipline wheels in motion (without restriction) and cannot now be heard to deny responsibility for the direction the Company chose to follow in disciplining Nails.

All employees have the right to be free from unfair or irrelevant or invidious treatment by their union in matters affecting employment and that right is guaranteed by Section 7 of the Act. *Miranda Fuel Co.*, 140 NLRB 181 (1962). In the case at hand Underwood violated Nails' right to withdraw from the Union by seeking to have Nails disciplined for stating he would do so. Underwood had clearly expressed his disdain for employees working in the plant as "scabs" and he was intent that Nails would not be the first. As an admitted agent of the Respondent Union, Underwood breached the duty owed to employees by their statutory representative by

restraining and coercing Nails in the exercise of his Section 7 rights in violation of Sections 8(b)(1)(A) and (2) of the Act.

The undisputed evidence shows that Nails was discharged because he threatened the life of Underwood. The threat referenced by Ferguson in the discharge interview was that reported to Kennedy by Underwood. Underwood later underscored the reported threat when he told Ferguson that Nails had a mental problem. Contrary to the Respondent Employer's argument in brief the evidence clearly shows that the Employer, through Kennedy and Ferguson, acted in direct response to Underwood's request. Underwood's purpose in reporting a threat was to have Nails disciplined and his report set the company wheels in motion. Respondent Employer further argues that even if the Union sought discipline and the Company imposed it, there is no causal connection between the two events. On this record no two events could be more causally connected. All consideration of discipline by company supervision was based solely upon a reported threat to Underwood's life. The fact that Holder, Kennedy, Ferguson, and Whit initially decided a warning would suffice but Ferguson ultimately issued a discharge does not serve to disconnect the two events.

When a union, through its president and for unlawful reasons, requests a company to discipline an employee and the company acts on the request without investigation to determine for itself what the facts are, the Union's unlawful purpose is imputed to the company as the motivation for its' action. Ferguson discharged Nails because it does not make a good workplace when employees have threats hanging over them and his only knowledge of the employee making the threat and the substance of the threat came from Underwood. Ferguson, as an agent of the Respondent Employer thus became a party to the Union's restraint and coercion of Nails in the exercise of his Section 7 rights by accepting the Union's complaint and acting upon it. The Respondent Employer thereby violated Section 8(a)(3) of the Act by discharging Nails for the reported threat to Underwood's life as a violation of its plant rule 20.

Absent an independent investigation by Ferguson or some management official into what transpired in the bathhouse the morning of March 20 between Nails and Underwood, the Respondent Employer cannot, and did not, after evidence to show that Nails would have been disciplined in any event without regard for his exercise of Section 7 rights.

In the alternative the Respondent Employer violated Section 8(a)(1) of the Act by discharging an employee for conduct which had not occurred, even though the Employer believed what Underwood had reported, the substance of

Underwood's report was unsubstantiated, and as shown in this record, was untrue.

In summary, the Respondent Union, through the actions of its local president, Underwood, has exceeded the acceptable conduct of *Miranda* and restrained protected Section 7 activities in violation of Section 8(b)(1)(A) and (2) of the Act while simultaneously causing the Respondent Employer to discharge an employee in violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. The Union by coercively restraining Nails' protected activities and by causing the Employer to discriminate against him in violation of Section 8(a)(3) has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

2. The Employer by discharging Nails because he engaged in protected activities violated Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices affect commerce within this meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that it necessary to order the Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent Employer having discriminatorily discharged its employee, Belton Nails, must offer him reinstatement to his former position without prejudice to seniority or other rights and privileges. The Respondent Union shall execute written notice stating it has no objection to such reinstatement. The Respondent Employer and the Respondent Union, jointly and severally shall make Belton Nails whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²

[Recommended Order omitted from publication.]

²Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).